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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 United States of America,
9
10 Plaintiff,

No. CR-13-8043-001-PCT-GMS

ORDER

11 v.

12 Valence Ray Smith, Sr.,
13 Defendant.

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15 The superseding indictment charges the Defendant with three counts of assault
16 that he allegedly inflicted on the same victim Maydena Samson. On September 29, 2012,
17 the Defendant allegedly hit Ms. Samson with a metal pipe, which among other damage
18 fractured her elbow. He is charged with both Assault with A Dangerous Weapon (Count
19 One) and Assault Resulting in Serious Bodily Injury (Count Two) for this alleged assault.
20 Mr. Smith acknowledges that he struck Ms. Samson with a broom handle on September
21 29, but alleges he did so in self-defense and further denies that it was with a metal pipe.
22 He is also charged with slicing Ms. Samson's foot with a knife on July 8, 2011. He is
23 charged with Assault with a Dangerous Weapon for this incident (Count Three). Mr.
24 Smith asserts that on July 8, 2011 Ms. Samson cut her own foot.

25 On August 29, 2013, the prosecution filed with this court a Notice of its Intent to
26 Introduce Evidence Pursuant to Rule 404(b). The Defendant filed his amended response
27 to that notice on September 16, 2013. The prosecution now desires the Court to give a
28 ruling prior to trial as to whether it will allow such testimony for its convenience in

1 bringing witnesses to testify. The seven incidents of other acts which the prosecution
2 wishes to introduce into evidence include the following:

3 A. Evidence of three assaults committed by the Defendant on his former
4 girlfriend, Pamela Jackson on November 7, 2004, January 3, 2005 and January 22, 2005.
5 In the first Defendant allegedly pulled Ms. Jackson out of her residence by her hair and
6 arms and continued to pull her along the street in this fashion, knocking her to the ground
7 several times in this process. In the second, Ms. Jackson reported to a Hualapai social
8 services worker that Defendant battered her, dragged her out of a car, and burned her
9 with a stove poker. Ms. Jackson showed three burn marks on her left arm, which were
10 photographed, as well as large scrapes on Jackson's right hip. In the third, Jackson stated
11 that Defendant, while intoxicated, grabbed a 2x4 board and struck her with it; he also
12 punched and kicked her. Her injuries were documented.

13 B. Evidence of two assaults committed by the Defendant on his former girlfriend,
14 Michelle Whatoname on June 26, 2007 and November 9, 2007. In the first, the
15 Defendant told a Hualapai police officer that he had been drinking with his girlfriend
16 since the previous night and that minutes before EMT's arrival, an unknown guest had
17 assaulted his girlfriend—Ms. Whatoname, and that Ms. Whatoname did not want to file
18 criminal charges against this unknown guest. Ms. Whatoname, however, told the officer
19 that Defendant assaulted her by grabbing her and throwing her around and that in that
20 process he threw her to the ground. In the second alleged incident, Ms. Whatoname
21 stated to investigating officers that Defendant had assaulted her.

22 C. Evidence of an assault committed by the Defendant on Picetta Walema on June
23 26, 2010, in which she alleged that the Defendant tried to rape her, while she was at the
24 Defendant's residence. After his arrest, at the BIA Correctional Facility when Defendant
25 was exiting the patrol vehicle, he said to one of the officers, "What is this shit about, I bet
26 it's about Picetta."

27 D. Evidence of an additional assault against Maydena Samson the victim in the
28 counts alleged in the indictment that occurred on December 12, 2010. In that alleged

1 incident, Defendant started to “swing and scratch” the victim after they had had an
2 argument while cutting firewood.

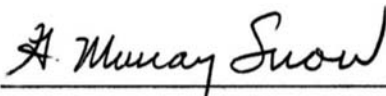
3 As an initial matter, the government has not provided the Court with any detail as
4 to how, or through him it intends to admit such evidence. In the absence of any detail as
5 to whom will be testifying and what specific and admissible evidence the government
6 intends to offer against the Defendant of each of these previous assaults, the Court cannot
7 “examine[] all the evidence in the case and decide[] whether the jury could reasonably
8 find the conditional fact . . . by a preponderance of the evidence.” *Huddleston v. United*
9 *States*, 485 U.S. 681, 690, (1988), *citing* 21 C. Wright and K. Graham, *Federal Practice*
10 *and Procedure* § 5054, p. 269 (1977). While it is presumably an accurate statement of
11 the law that a defendant’s statement alone is enough to admit other act evidence, *United*
12 *States v. Norris*, 428 F.3d 907, 913 (9th Cir. 2005), in *Norris*, the Defendant voluntarily
13 admitted to the other acts in those statements. There are no such admissions here. The
14 Defendant made statements in only two of the described incidents, and only one of these
15 infers some knowledge of allegations that may have been made against him, but even so,
16 does not affirmatively admit to such allegations.

17 Further, according to the Defendant, Ms. Whatoname is now deceased. It is thus
18 unclear to this court how the prosecution intends to introduce evidence of the assaults
19 against her in an admissible fashion and the government provides no insight as to this.

20 Therefore, to the extent that the government wants an advance ruling on whether
21 the Court will admit such testimony, any such advance ruling is denied. The Court
22 notes, however, that while none of the incidents seem so remote as to preclude admission
23 of evidence concerning them, admitting all of the evidence of all of the alleged assaults
24 would be seriously prejudicial to the Defendant unless each one provides some probative
25 evidence other than merely propensity evidence. Merely offering seven instances of past
26 assault to establish that the Defendant has assaulted or been accused of assaulting his
27 girlfriends in the past is nothing more than propensity evidence, and even if not, its
28 prejudicial value substantially outweighs its probative value.

1 While the Court can see that some of the individual instances of assault may have
2 the potential to provide admissible evidence under Fed. R. Evid. 404(b) whose probative
3 value is not substantially outweighed by its prejudice, such as evidence pertaining to
4 intent, or lack of mistake, the government does not say how or what admissible evidence
5 it intends to introduce of such past assaults, thus the court cannot determine, prior to trial,
6 that it will admit such testimony. The government's request for any pre-trial
7 determination as to the admissibility of any other act evidence is, therefore, denied.

8 Dated this 31st day of December, 2013.

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12 G. Murray Snow
13 United States District Judge
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